

THE INCOMPLETE PROCESS OF FIXING ALASKA'S DOMESTIC VIOLENCE PROTECTIVE ORDER STATUTE

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ABSTRACT

*The Alaska legislature has codified, in section 18.66.100 of the Alaska Statutes, a process through which petitioners can seek a domestic violence protective order. Such an order offers petitioners a range of protections against a household member who has committed a crime of domestic violence. Most of the protections afforded under these orders last one year, and the means by which a petitioner could renew a domestic violence protective order has, until recently, remained unclear. In *Whalen v. Whalen*, decided in August 2018 by a three to two margin, the Alaska Supreme Court clarified that renewal process. The court held that a petitioner must suffer a new crime of domestic violence before a new domestic violence protective order can be issued. Such a ruling may seem quite harsh, and in fact, shortly thereafter, the legislature amended section 18.66.100 to provide for an extension mechanism and to explicitly reject the notion that a new order must be predicated on a new crime of domestic violence. This Note inspects why the ruling, rather than a harsh judicial construct, was instead a product of the separation of powers and a respect for the limits of the court vis-à-vis the legislature. Further, this Note engages with the legislative history to illustrate the development of the statute. Lastly, this Note collects corresponding statutes from other states and compares them to the current iteration of section 18.66.100. Upon review of similar statutes, it is clear that the *Whalen* amendment merely addressed an issue that should have never existed in the first place, and there is still much that the legislature can do to build on the *Whalen* amendment in order to reduce Alaska's high rates of domestic violence.*

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I. INTRODUCTION

In September 2014, Sarah Whalen obtained a domestic violence protective order against her husband, Sean.¹ Sean allegedly continued to harass and intimidate Sarah and her family, and in September 2015, Sarah requested a modification of the 2014 order, hoping to extend it.² Since the vast majority of the order's provisions lasted only one year—the statutory maximum—she felt an extension of the original order was necessary to protect herself and her children.³ The superior court, however, denied her request to modify the original order, instructing Sarah to petition for a new order.⁴ In November 2015, five months after her divorce was finalized, Sarah petitioned for a new protective order against her former husband.⁵

The superior court held a hearing in December 2015.⁶ Sean and Sarah both testified, but the court limited their testimony.⁷ Having issued its original protective order based on Sean's behavior up until September 2014, the court asserted that it could not grant a new protective order for those same incidents.⁸ Under its interpretation of Alaska's protective order statute, section 18.66.100 of the Alaska Statutes, a new order could only derive from a new incident of domestic violence.⁹ The court limited Sarah's testimony to Sean's actions after September 2014.¹⁰ Since then, nothing he had done qualified as a new incident of domestic violence, and therefore the superior court denied Sarah's petition.¹¹ Sarah lost on appeal, and the Alaska Supreme Court affirmed.¹² Though swayed by the policy arguments in Sarah's favor, the court refrained from interpreting the statute differently, noting that Sarah's remedy was to be found in the legislature, not the courts.¹³

Whalen v. Whalen highlights what was a critical flaw in section 18.66.100 of the Alaska Statutes, the law governing protective orders. However, there is far more to the *Whalen* story than a court ruling and a legislative fix. Alaska suffers from high rates of domestic violence; a

1. *Whalen v. Whalen*, 425 P.3d 150, 152 (Alaska 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 157.

recent survey of Alaska women found that forty percent experienced intimate partner violence and thirty-three percent experienced sexual violence, resulting in one out of two women suffering one or the other, or both.¹⁴ In 2017, among all states, Alaska had the highest rate at which women were murdered by men,¹⁵ a ranking which remained unchanged for the fourth straight year.¹⁶ The Centers for Disease Control and Prevention released data from 2010 to 2012, showing that 43.3% of Alaska women were victims of any contact sexual violence, physical violence, and/or stalking by an intimate partner, ranking the state second-worst among all states and six percentage points higher than the national average.¹⁷ Alaska Native women also experience domestic violence at far higher rates than Alaska women of other ethnicities.¹⁸

The outcome in *Whalen* coupled with the aforementioned statistics highlighted the necessity of a legislative response to the statute's lack of an extension provision. As a result, in 2019, the legislature amended section 18.66.100 to include an extension mechanism, and further, to explicitly reject the harsh outcome of *Whalen*.¹⁹

The court in *Whalen* demonstrated considerable restraint, and its restraint was matched with a swift legislative response. These are both good principles on which to build. Yet Alaska's struggle with domestic violence remains a pervasive issue, and the legislature has otherwise remained relatively stagnant. Reviewing the development of the domestic violence protective order statutory scheme can inform how the legislature may take more significant steps forward without the need for another *Whalen* to galvanize it into action.

This Note addresses the *Whalen* decision—assessing the court's

14. ANDRÉ ROSAY & LAUREE MORTON, INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE IN THE STATE OF ALASKA: KEY RESULTS FROM THE 2015 ALASKA VICTIMIZATION SURVEY (2016), <https://scholarworks.alaska.edu/handle/11122/8103>.

15. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2017 HOMICIDE DATA 4 (2019), <https://vpc.org/studies/wmmw2019.pdf>.

16. Beth Verge, *Report: For Fourth Year In a Row, Alaska Has Highest Rate of Men Killing Women*, KTUU (Last updated Sept. 19, 2019 5:07 AM), <https://www.ktuu.com/content/news/Report-For-fourth-year-in-a-row-Alaska-has-highest-rate-of-men-killing-women-560736821.html>.

17. SHARON SMITH ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010-2012 STATE REPORT 128 (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

18. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN (2016), https://www.speakcdn.com/assets/2497/american_indian_and_alaskan_native_women_dv.pdf.

19. An Act Relating to Protective Orders, §§ 4, 5, 2019 Alaska Sess. Laws ch. 7, 2-3.

deference, though not indifference, in the face of myriad policy arguments. Many lessons can be gleaned from this strict adherence to the separation of powers, especially considering the emotional nature of the issues raised. Perhaps most importantly, the decision highlights the important role that the legislature must play in this issue, and how the legislature should demonstrate leadership moving forward.

Second, this Note analyzes the growth of section 18.66.100 and how its stages of development may have been impacted, perhaps even limited, by policy concerns unique to the realities of domestic violence. Next, this Note reviews approaches in other states in order to benchmark Alaska's domestic violence protective order scheme. Finally, this Note addresses how the newest iteration of section 18.66.100 still falls short, and how the legislature can finally assume a leadership role by more effectively addressing the pervasive issue of domestic violence in Alaska.

II. ALASKA'S PRE-WHALEN PROTECTIVE ORDER STATUTORY SCHEME

Section 18.66.100 of the Alaska Statutes governs domestic violence protective orders.²⁰ The present statute is identical to the pre-*Whalen* statute, aside from the added provisions aimed at resolving the issues raised in *Whalen*.²¹ To be eligible for a protective order, the petitioner must show, by a preponderance of evidence, that the respondent committed a crime involving domestic violence.²² As defined in the statute, domestic violence is violence "by a household member against another household member."²³ The legislature lists these relationships as those between spouses, people living together, people who are dating, and people who have a sexual relationship,²⁴ as well as a number of familial relationships, including the children of a person in an aforementioned relationship.²⁵ The legislature emphasized that each of these relationships need not be current – they merely must be shown to have existed at one point.²⁶

Section 18.66.990 of the Alaska Statutes enumerates a number of criminal offenses which satisfy the act element, including homicide, assault, reckless endangerment, kidnapping, sexual offenses, robbery, extortion, coercion, burglary, criminal trespass, arson, criminal mischief,

20. ALASKA STAT. § 18.66.100 (2019).

21. See *infra* Part VI.

22. ALASKA STAT. § 18.66.100(a).

23. *Id.* § 18.66.990(3) (2018).

24. See Beth Trimmer, Comment, *A Sexual Relationship, Did We Have One? A Review of the Definition of "Sexual Relationship" Within the Context of Alaska's Domestic Violence Laws*, 24 ALASKA L. REV. 237, 255–56 (2007).

25. ALASKA STAT. § 18.66.990(5) (2018).

26. *Id.*

terrorist threatening, harassment, and cruelty to a pet.²⁷

Commission of one of the crimes involving domestic violence set forth in section 18.66.990, or a violation of a protective order itself, satisfies the act requirement for the issuance of a protective order.²⁸ A person violates a protective order when he “knowingly commits or attempts to commit an act with reckless disregard that the act violates . . . a provision of the protective order.”²⁹ The Alaska Supreme Court has clarified that the statute does not permit ignorance of the law as a defense.³⁰ To prove a violation, the State must show that the person had notice of the protective order and either “recklessly disregarded a substantial and unjustifiable risk that his conduct was prohibited by the order,” or knowingly committed or attempted to commit an act prohibited by the order.³¹ Lastly, the statute does not require a criminal conviction; rather, the petitioner must prove, by a preponderance of the evidence, that the respondent committed a criminal act.³²

Section 18.66.100 contains fifteen specific restrictions and mandates, any of which the court can include in a protective order, as well as a catch-all sixteenth provision, which gives the court discretion to “order other relief the court determines necessary to protect the petitioner or any household member.”³³ Enumerated options for relief include prohibitions against contacting the petitioner or other household members,³⁴ entering vehicles owned by the petitioner,³⁵ and going to places frequented by the petitioner or other household members.³⁶ These prohibitions can also bar the respondent from using controlled substances.³⁷ Furthermore, the order can remove and exclude the respondent from the petitioner’s

27. *Id.* § 18.66.990(3)(A)–(I).

28. *Id.* § 18.66.990(3)(G).

29. *Id.* § 11.56.740 (2018).

30. *See* State v. Strane, 61 P.3d 1284, 1292 (Alaska 2003) (“We thus hold that AS 11.56.740(a) did not require the state to prove Strane’s actual knowledge of illegality; instead, the statute’s culpable mental state requirement as to the surrounding circumstances of the offense could be met by showing that Strane knew of the restraining order’s existence and contents and that, so knowing, he recklessly disregarded a substantial and unjustifiable risk that his conduct was prohibited by the order.”).

31. *Id.*

32. *See* State v. Bingaman, 991 P.2d 227, 230 (Alaska Ct. App. 1999) (“[T]he legislature appears to consistently use the phrase ‘crimes involving domestic violence,’ defined in AS 18.66.990(3), in a context which indicates that the legislature is referring to a criminal act, not a criminal conviction.”).

33. ALASKA STAT. § 18.66.100(c)(16) (2019).

34. *Id.* § 18.66.100(c)(2).

35. *Id.* § 18.66.100(c)(5).

36. *Id.* § 18.66.100(c)(4).

37. *Id.* § 18.66.100(c)(11).

residence, regardless of the residence's ownership.³⁸ Lastly, only when the court finds that the respondent possessed a firearm during the crime can it direct the respondent to surrender all firearms for the duration of the order.³⁹

The court can take steps to remove children from dangerous situations, as the statute permits the court to award temporary custody to the petitioner.⁴⁰ The statute also enables the court to order the respondent to partake in alcohol-abuse treatment and participate in a rehabilitative program for the perpetrators of domestic violence, serving as powerful tools to begin correcting the root causes of these crimes.⁴¹

The statute's financial provisions enable the court to order the respondent to pay for the petitioner's shelter, medical expenses, counseling, property damage, and other costs incurred as a result of the domestic violence.⁴²

The aforementioned provisions laid out in section 18.66.100(c) are all in effect for one year—or less if dissolved by the court—aside from provisions of a protective order issued under subsection 18.66.100(c)(1), which are “effective until further order of the court.”⁴³ This indefinite provision “prohibit[s] the respondent from threatening to commit or committing domestic violence, stalking, or harassment.”⁴⁴

Whereas protective orders are sought as a civil remedy, the violation of a protective order is a Class A Misdemeanor,⁴⁵ punishable by a \$25,000 fine⁴⁶ and a maximum of one year imprisonment.⁴⁷ Moreover, violating a protective order triggers section 18.65.530 of the Alaska Statutes, under which the responding officer, upon a finding of probable cause, is required to arrest the offender.⁴⁸

III. WHALEN V. WHALEN

The protective order statutory scheme remained largely untouched until it found the spotlight of the Alaska Supreme Court's scrutiny. The legislature's opportunity to adjust the existing protective order statute

38. *Id.* § 18.66.100(c)(3).

39. *Id.* § 18.66.100(c)(6)–(7).

40. *Id.* § 18.66.100(c)(9).

41. *Id.* § 18.66.100(c)(15).

42. *Id.* § 18.66.100(c)(13)–(14).

43. *Id.* § 18.66.100(b).

44. *Id.* § 18.66.100(c)(1).

45. *Id.* § 11.56.740 (2018).

46. *Id.* § 12.55.035(b)(5) (2018).

47. *Id.* § 12.55.135(a) (2018).

48. *Id.* § 18.65.530(a)(2) (2018).

was highlighted in *Whalen v. Whalen*, decided in August of 2018.⁴⁹ To understand the options still available to the legislature, as well as the reforms ultimately pursued in 2019, it is first important to illustrate in what sense the court's hands were tied in *Whalen*. As an initial matter, the court disagreed with Sarah, the appellant, and held that section 18.66.100 of the Alaska Statutes did not permit a court to issue a protective order where there was no new incident of domestic violence.⁵⁰ The court based its ruling on two grounds.

First, the court applied the theory of res judicata.⁵¹ When a claim has been fully litigated and the court makes a final and valid judgment on the claim's merits, res judicata, or claim preclusion, bars the parties from litigating the claim again.⁵² Thus, the court framed the issue as whether or not "Sarah [was] attempting to receive a second judgment on a claim that she has previously asserted."⁵³ Reasoning that the September 2014 protective order satisfied the elements of claim preclusion—a judgment between the same parties that is valid, final, and on the merits—the court determined that Sarah's claim was extinguished.⁵⁴

The court found Sarah's two arguments opposing the applicability of res judicata unpersuasive. Her first argument, that domestic violence is an abatable condition and thus similar to a temporary nuisance, carried little weight.⁵⁵ A temporary nuisance claim permits a new cause of action each time there is an invasion.⁵⁶ However, a new invasion had not occurred, and if it had, section 18.66.100 would have clearly applied.⁵⁷ Her second argument relied on *McComas v. Kirn*⁵⁸—another case in which res judicata was raised in relation to a protective order.⁵⁹ However, in *McComas*, the court found that the circumstances had materially changed, and so the claim was not truly being relitigated.⁶⁰ This exception did not apply to Sarah's case because her circumstances had not materially

49. 425 P.3d 150 (Alaska 2018).

50. *Id.* at 155.

51. *Id.* at 154.

52. *See id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 18(1) (AM. LAW INST. 1982)) ("When a valid and final personal judgment is rendered in favor of the plaintiff[,] . . . [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although [s]he may be able to maintain an action upon the judgment.").

53. *Id.* at 154.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 105 P.3d 1130 (Alaska 2005).

59. *Whalen*, 425 P.3d at 154.

60. *Id.* at 154–55.

changed.⁶¹

Second, the court based its holding on the statute's language and history. The court noted that the legislature undoubtedly contemplated a renewal process; the legislature had set durational limitations for many of the statute's provisions but it had also allowed subsection (c)(1), prohibiting acts or threats of domestic violence, to persist indefinitely at the discretion of the judge.⁶² The court reasoned that these durational specifications demonstrated the legislature's intent to limit these orders to the one-year timeframe.⁶³ Furthermore, given that the original six-month time limit was doubled in 2004, the court posited that the legislature could have provided for a renewal process, but that it had eschewed such a process in favor of a longer duration.⁶⁴ Most importantly, the court noted that the legislature completely eliminated the extension provision when it passed the 1996 Domestic Violence Prevention and Victim Protection Act.⁶⁵ Therefore, the absence of such a provision in section 18.66.100, coupled with the legislature's ample opportunity and apparent decision not to institute a renewal process, led the court to believe that the legislature never intended for a protective order to be issued absent a new incident of domestic violence.⁶⁶

Sarah and the amici also pointed to committee hearings, during which legislators seemed to indicate a presumption that the statute allowed for renewals.⁶⁷ Nonetheless, the court refused to "rewrite the law to conform to a mistaken view of the law that the legislature had when it amended the statute."⁶⁸ Highlighting the legislature's role in setting policy, the court determined that the absence of a renewal provision was a policy choice, concluding that "[i]t is not the court's role or prerogative to modify the legislature's policy decision."⁶⁹

The court's decision meant that Sarah would go without a protective order until either the legislature amended the law or she suffered another incident of domestic violence. While legislative action was hardly out of

61. *Id.* at 155.

62. *Id.*

63. *See id.* ("[T]he language of the statute unambiguously provides for the duration of the various kinds of protective relief that can be ordered.").

64. *See id.* at 155-56 ("Those specific time limits were expanded by the 2004 legislation. If the legislature intended to allow for multiple protective orders from the same incident of domestic violence, it did not say so in the statute.").

65. *Id.* at 155.

66. *See id.* at 157 ("Here the legislature enacted an unambiguous statute with a clear time limit—originally six months then later one year—and it did so while replacing a statute that permitted an extension. It is not the court's role or prerogative to modify the legislature's policy decision.").

67. *Id.* at 156; *see also infra* Part V.

68. *Whalen*, 425 P.3d at 155.

69. *Id.* at 157.

the question, the difficult decision trapped Sarah in an impossible situation, sparking two of the five members of the court to join in a dissenting opinion.⁷⁰

Joined by Justice Winfree, Justice Maassen argued in his dissenting opinion that neither the statute nor *res judicata* should have tied the court's hands.⁷¹ *Res judicata*, wrote Justice Maassen, applies in a civil suit, where a party is injured, receives compensation for the injury, and is thus barred from bringing the same claim against the same defendant.⁷² By applying the doctrine, the majority had denied the second step in the petition process: the judge's discretion to grant the order.⁷³ Once the court finds that the respondent committed an act of domestic violence against the petitioner, the claim has not run its course, as it would have in a civil case.⁷⁴ The second step to granting a protective order, Justice Maassen pointed out, involves the judge exercising his discretion to determine whether the order should be granted.⁷⁵ This discretion is rooted in the statute's fundamental purpose, which is to protect the petitioner; punishing the respondent is a means to an end, not the end itself.⁷⁶ And unlike a civil case, in which the claim is complete when the judgment is issued and damages are awarded, the question of whether protection is still necessary beyond the first year is not answered in the original protective order.⁷⁷ All the original order determined was that the petitioner needed protection at that moment, not a year into the future.⁷⁸ Therefore, "[b]ecause that claim was not and could not have been litigated in 2017, the doctrine of *res judicata*, by definition, cannot apply."⁷⁹

Additionally, the dissenting justices disagreed with the majority's reading of section 18.66.100. They first noted that, while the legislature had not explicitly allowed multiple protective orders to derive from the same incident of domestic violence, neither had it explicitly denied that numerous protective orders could be granted based on a single incident.⁸⁰

70. *Id.* at 158.

71. *Id.* (Maassen, J., dissenting).

72. *Id.* at 159.

73. *Id.*

74. *See id.* ("[A] domestic violence petition is thus much different from, say, a claim for the tort of assault, in which the plaintiff is awarded compensation for a past wrong and then closes the books on it forever.").

75. *Id.*

76. *See id.* ("It is a 'protective order,' intended not only to acknowledge a past bad act on the part of the respondent but also, and primarily, to protect the petitioner from future harm.").

77. *See id.* ("A domestic violence petitioner is seeking ongoing protection, not compensation for a past wrong.").

78. *Id.*

79. *Id.*

80. *Id.* at 158.

As for the one-year time limit on most provisions, the dissenting justices viewed that as an indication of when a review of the provisions' efficacy should take place.⁸¹ Subsection (b)(2), which restricts the provisions to one year, "simply assures that there will be a new judicial review . . . requir[ing] a petitioner to return to court to justify the continuation of such extraordinary restrictions if, after a year has passed, she still requires protection."⁸²

Though the dissent is persuasive, reading into the statute a mechanism for extending a protective order nonetheless would have usurped the legislature's role as the lawmaking body. Between potentially overstepping its role and limiting itself perhaps beyond what was necessary, the court chose the latter, sending a message to the legislature that the courts would not rewrite laws that were poorly written to begin with.

Domestic violence is terrible. That is not up for debate. The emotional nature of the problem would have compelled judicial action perhaps more than any other case decided in the 2018 term. Yet the court chose restraint. This choice was a testament to the principles underpinning the separation of powers. Sarah Whalen deserved a better outcome, but the court's role was not to rewrite the law to ensure such an outcome. A decision in the alternative may have done just that, and while that outcome in the instant case would have been more suitable, the foundations which separate the branches of government would have been weakened. To understand the legislative folly leading to the *Whalen* decision, it is important to investigate the legislative history of the protective order statutory scheme.

IV. PRIOR VERSIONS OF THE STATUTE

Alaska's modern protective order statutory scheme is rooted in its predecessor, section 25.35.010 of the Alaska Statutes.⁸³ This previous iteration was quite different, though many of the injunctive and monetary relief provisions carried over to the present version.⁸⁴ The most glaring differences were in the duration of the order and, critically, the ability to renew the order at the petitioner's request.⁸⁵ The original orders lasted at most ninety days—a far cry from today's year-long timeframe, or the indefinite section 18.66.100(c)(1) provision.⁸⁶ With that said, section

81. *Id.*

82. *Id.*

83. ALASKA STAT. § 25.35.010 (repealed 1996).

84. Compare *id.*, with ALASKA STAT. § 18.66.100 (2019).

85. *Id.* § 25.35.010.

86. *Id.* § 25.35.010(c).

25.35.010 did contain a renewal procedure, granting the court the authority to extend the injunctive relief provisions another forty-five days if necessary.⁸⁷

In 1996, the Alaska legislature passed the Domestic Violence Prevention and Victim Protection Act ("1996 Act"),⁸⁸ overhauling the protective order statutory scheme.⁸⁹ Why the extension provision was eliminated from the 1996 Act is not immediately clear, though striking a reasonable balance between the petitioner's protection and the respondent's rights seemed to play an important role. Throughout the various committee hearings on the 1996 bill, increasing the length of time of orders and removing the extension provision were scarcely covered topics. However, one key portion of the minutes does seem to encapsulate a critical viewpoint regarding the balancing of rights and protection. Co-Chairman of the Senate Finance Committee, Senator Rick Halford, while discussing the property rights of respondents, noted his concern for the potential violation of individuals' constitutional rights, though he thought such violations were acceptable so long as the orders were absolutely necessary and limited in duration.⁹⁰

Without placing too much weight on Halford's ability to influence the legislation, it is critical to note that Halford, a Republican, was the Senate Majority leader during 1996, and he had served as the President of the Senate from 1994 to 1995.⁹¹ It stands to reason that his concern over the "trampling of constitutional rights" was not an isolated viewpoint, and the fact that he voiced his opinion on the issue indicates that legislation which tipped the balance too far against the respondent may not have even made it to a vote, at least not under his leadership. While the minutes do not offer definitive answers as to why the extension provision was eliminated, Senator Halford's concerns should not be dismissed as the ruminations of a lone senator, but perhaps viewed instead as the opinion of a large contingent of the legislative body.

V. RELEVANT LEGISLATIVE HISTORY

The only significant amendment to section 18.66.100 of the Alaska Statutes prior to *Whalen* occurred in 2004, when the legislature doubled

87. *Id.* § 25.35.010(c).

88. Domestic Violence Prevention and Victim Protection Act, 1996 Alaska Sess. Laws ch. 64.

89. *See id.*

90. *Hearing on H.B. 314, S. FIN. COMM., MINUTES, 19th Leg. (May 5, 1996)* (comments of Sen. Rick Halford).

91. *22nd Alaska State Legislature Senator Rick Halford (R) President of the Senate, ALASKA REPUBLICANS*, <http://www.akrepublicans.org/pastlegs/22ndleg/bio-halford.shtml> (last visited April 19, 2020).

the time limit of most of the protective order provisions from six months to twelve months.⁹² The 2004 amendment was introduced by Senator Hollis French in Senate Bill 308 (“SB 308”).⁹³ In the first committee hearing for SB 308, Senator French summarized the comparable statutes in other states, noting:

[J]ust five states have long-term domestic violence protective orders that have a shorter time period than Alaska. Three have the same six-month maximum period and the 40 other states have increased the length of time to a year and beyond. In this bill we would set the time frame at one year. It’s an incremental step and I think it’s a reasonable balance between an order that never ends and an order that is too short of a duration.⁹⁴

It is telling that Senator French introduced SB 308 with this statement. First, it demonstrates that the primary factor motivating the bill was that the length of Alaska’s protective order provisions lagged behind those of most other states. Additionally, it shows that the legislature attempted to strike a “reasonable balance” between the petitioner’s security and the rights of the respondent. Longer or even permanent orders could have deprived the respondent of certain rights and liberties; similarly, the ability to renew an order without new incidents of domestic violence was perhaps deemed inimical to striking a balance between the interests of the petitioner and the rights of the respondent.

It is also likely that the senators did not realize that a petitioner could not renew the protective order given that they discussed the prospect of renewals on numerous occasions. At one point, Senator Gretchen Guess stated that if, at the end of a six month restraining order, continued protection was warranted, then a petitioner could simply seek another order.⁹⁵ Senator French agreed, noting that someone whose relationship issues continued up to the six month mark could simply have the order extended.⁹⁶ At a later hearing, Senator French framed the lengthening from six months to one year as a cost-saving measure given the frequency at which courts must renew orders, and he highlighted specific examples

92. Act of June 29, 2004, § 23, 2004 Alaska Sess. Laws ch. 124, 12.

93. See *Hearing on S.B. 308*, ALASKA S. STATE AFFAIRS COMM. MINUTES, 23d Leg. (Mar. 11, 2004) (comments of Sen. Hollis French) (extending the order to one year assures “longer protection to petitioners who are seeking protection from an abuser”). The substance of this amendment was ultimately passed in SB 170. Act of June 29, 2004, § 23, 2004 Alaska Sess. Laws ch. 124, 12.

94. *Hearing on S.B. 308*, ALASKA S. STATE AFFAIRS COMM. MINUTES, 23d Leg. (Mar. 11, 2004) (comments of Sen. Hollis French).

95. *Id.* at 16 (comments of Sen. Gretchen Guess).

96. *Id.* (comments of Sen. Hollis French).

of petitioners who sought numerous orders because of continuing issues with respondents.⁹⁷

The court in *Whalen* argued that these exchanges demonstrated the senators' awareness of the lack of a renewal provision, because their use of "refile" and "extended" was in the context of "lingering issues," implying that these new protective orders were supported by new incidents of domestic violence.⁹⁸

More likely, though, the senators did not realize that the statute's wording would, fifteen years later, be interpreted to require a new incident of domestic violence. As the dissent in *Whalen* pointed out, the legislature "did not say it intended to *prohibit* 'multiple protective orders from the same incident of domestic violence,' which it could easily have done had it intended that result."⁹⁹ In all likelihood, the dissent's analysis of the legislative history is correct. To read into the legislative history an explicit requirement of a new incident of domestic violence seems a bridge too far based on the scant deliberations.

There is also a significant likelihood that the legislature may have been dissuaded from adopting a new extension mechanism because of the desire to strike a "reasonable balance" between the petitioner's safety and the respondent's rights. The focus on such a balance shows that the legislature may not have intended to allow renewals in the absence of a new incident of domestic violence. At one hearing, a member of the public, James Dieringer III, contended that he was "that 10 to 15 percent of the men who have been abused by this system" and that five protective orders were issued against him "as a tool to gain custody, child support, possession of the home, those kinds of things."¹⁰⁰

Notably Dieringer's testimony foreshadowed the very issue raised in *Whalen*. He requested that the senators revisit the probable cause standard, condemning the court's apparent ability to find probable cause to issue new orders based solely on the acts which justified the original order.¹⁰¹ Barbara Brink, the Director of the Alaska Public Defender Agency, expressed similar concerns.¹⁰² She added that the amendment paternalistically required the court to issue one-year orders, and that she

97. *Hearing on S.B. 308*, ALASKA S. JUDICIARY COMM. MINUTES, 23d Leg. (Mar. 26, 2004) (comments of Sen. Hollis French).

98. *See Whalen v. Whalen*, 425 P.3d 150, 156 (Alaska 2018) ("This understanding is consistent with allowing additional orders only when the prior order has been violated or when a new incident of domestic violence has occurred.").

99. *Id.* at 158.

100. *Hearing on S.B. 308*, ALASKA S. JUDICIARY COM. MINUTES, 23d Leg. (Mar. 26, 2004) (comments of James Dierenger III).

101. *Id.* at 26.

102. *Id.* at 27 (comments of Barbara Brink).

was far more amenable to giving the judge the discretion to grant an order of six months and up to one year.¹⁰³

These concerns were not lost on the Committee. Responding to Dieringer's complaints regarding the court's ability to reuse past acts of domestic violence to justify multiple orders, Senator Scott Ogan remarked that it could be a good idea to revisit, and potentially increase, the probable cause requirement applicable to the protective orders.¹⁰⁴ Senator Ralph Seekins, Chairman of the Committee, reflected that he was aware of attorneys who abused the protective order system to gain leverage during divorce proceedings.¹⁰⁵ Later, Senator Ogan proposed Amendment 2, which would have required petition forms to "contain a conspicuous warning that the petitions and requests are submitted under oath under penalty of perjury and that a person making a false statement may be prosecuted for perjury and, if found guilty, may be punished for violation of a felony."¹⁰⁶ The Senate Judiciary Committee did in fact adopt the amendment.¹⁰⁷ Though it was not ultimately included in the final version of the bill,¹⁰⁸ its adoption speaks to the importance placed on the respondent's liberty. Clearly, a desire to ensure some level of protection for the respondent influenced these proceedings.

Interestingly, the *Whalen* court refrained from highlighting these policy concerns. A likely explanation can be found in Dierenger's statement, in which he confessed, "I'm kind of embarrassed to be here today. I'm very nervous to be here."¹⁰⁹ Simply put, many people still believe that discussing domestic violence is taboo.¹¹⁰ Considering the harshness of the court's ruling, a discussion of an abuser's rights and liberties likely was not deemed the most tactful or persuasive approach.

The 2004 amendment to section 18.66.100 of the Alaska Statutes could be characterized as concise, narrow, and perfunctory. While the legislature demonstrated some awareness of Alaska's domestic protective order statute in relation to other states, legislators failed to engage with the language of the statute beyond the basic discussions regarding an

103. *Id.*

104. *Id.* at 26 (comments of Sen. Scott Ogan).

105. *Id.* (comments of Sen. Ralph Seekins).

106. *Hearing on S.B. 308, ALASKA S. JUDICIARY COM. MINUTES, 23d Leg. (Apr. 7, 2004)* (comments of Sen. Scott Ogan).

107. SB 308, 23rd Leg., 2d Sess. (2004).

108. See Act of June 29, 2004, § 23, 2004 Alaska Sess. Laws ch. 124, 12 (not including the amendment in the final text).

109. *Hearing on S.B. 308, ALASKA S. JUDICIARY COM. MINUTES, 23d Leg. (Mar. 26, 2004)* (comments of James Dierenger III).

110. ALLSTATE FOUNDATION, 2018 NATIONAL POLL ON DOMESTIC VIOLENCE AND FINANCIAL ABUSE 26 (2018) (finding that 1 in 3 people think discussing domestic violence is taboo, up ten percent since 2014).

order's length. Perhaps the desire to strike a reasonable balance between the parties' interests and rights dissuaded legislators from taking a more aggressive approach to the amendment, and interestingly enough, this policy concern did dominate much of the deliberations. Yet, despite touching on the issue of an extension mechanism, the legislature chose to limit its focus to the length of the original order. It is clear that the amendment failed to address the issue that would later surface in *Whalen*.

VI. POST-WHALEN AMENDMENT

In 2019, the Alaska legislature once again amended section 18.66.100 of the Alaska Statutes.¹¹¹ State Representative Chuck Kopp, the prime sponsor for House Bill 12 ("HB 12"), remarked that this amendment was a direct response—a fix—to the *Whalen* decision.¹¹² Representative Kopp set forth the bill's core purpose, which was to allow "victims that already have a long term protective order to request an extension of that order within thirty days of it expiring or up to sixty days after it has expired."¹¹³ Further, Representative Kopp noted that HB 12 sought to specifically address the *Whalen* decision, allowing court's to grant extensions based on the petitioner's continuing fear rather than a new incident of domestic violence.¹¹⁴

Compared to the 2004 amendment, which sought to address imprecise and complicated policy goals—preventing domestic violence and aligning Alaska's domestic violence protective order statutory scheme with a perceived standard gleaned from statutes across the nation—the 2019 amendment was a more intentional, targeted response to a readily identifiable problem. Thus, rather than legislators and witnesses struggling to unravel the conundrum of domestic violence, the witnesses were able to address the specific issue of the lack of an extension mechanism in section 18.66.100. As a result, deliberations were more illuminating, and the concept of striking a "reasonable balance" was not nearly the detractor that it proved to be during the 2004 amendment process.

The legislature heard public testimony from leaders in the field of domestic violence prevention in Alaska. Their insight shed light on the practical reverberations of the *Whalen* decision. Teryn Bird, an attorney representing victims of domestic violence, emphasized that at least one court, the Fourth Judicial District in Fairbanks, re-issued orders without

111. An Act Relating to Protective Orders, 2019 Alaska Sess. Laws ch. 7.

112. *Hearing on H.B. 12*, H. STATE AFFAIRS COMM. AUDIO TAPES, 31st Leg. (Feb. 28, 2019) (comments of Rep. Chuck Kopp at 3:10:32 PM).

113. *Id.* (comments of Rep. Chuck Kopp at 3:13:53 PM).

114. *Id.*

requiring a finding of a new act of domestic violence.¹¹⁵ The *Whalen* decision abruptly ended this practice.¹¹⁶ Bird revealed that “countless clients” have been affected by the *Whalen* decision.¹¹⁷ She recounted the story of one family who, after the expiration of a year-long protective order, continued to suffer a perpetrator’s constant intimidation.¹¹⁸ His acts did not rise to a crime or threat of domestic violence, but because of the expiration of the year-long protective order, the family would have to be “re-victimized if they ever want to be provided the same opportunity to heal and feel protected.”¹¹⁹

Christine Pate of the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) reiterated that there was considerable confusion among lower courts regarding the prospect of issuing extensions.¹²⁰ Like Bird, Pate testified that judges in various regions of Alaska interpreted their level of discretion differently, so that some courts frequently granted new orders without requiring new incidents of domestic violence while others did not.¹²¹ Pate additionally illustrated how the *Whalen* decision confounded an already horrific situation for victims. With only one, year-long order to protect them, victims were “forced to make impossible strategic decisions as to when to apply for a protection order so as to maximize their safety.”¹²² The House Judiciary Committee subsequently held a hearing for HB 12, and public testimony again attracted numerous leaders in the domestic violence prevention field, all of whom highlighted the struggles endured by victims following the *Whalen* decision.¹²³

Unlike in 2004, the legislators did not dwell on the rights of the respondent. Perhaps this was due to a change in times. More likely, however, is that the *Whalen* trigger cabined the deliberations. The notion that another order would require a new incident of domestic violence is shocking, and rectifying that outcome would hardly support a review of how the fix would impact respondents. In fact, such a discussion would be tasteless. On the other hand, the 2004 deliberations involved a

115. *Hearing on H.B. 12*, H. STATE AFFAIRS STANDING COMM. AUDIO TAPES, 31st Leg. (Mar. 7, 2019) (comments of Teryn Bird at 4:10:14 PM).

116. *See id.* (“That remedy has been removed, leaving victims of egregious and lethal crimes without protection unless re-victimized in a way that is recognized as a crime by the State of Alaska.”).

117. *Id.*

118. *Id.* at 4:11:02 PM.

119. *Id.* at 4:12:10 PM.

120. *Id.* (comments of Christine Pate at 4:13:33 PM).

121. *Id.*

122. *Id.* at 4:15:54 PM.

123. *See Hearing on H.B. 12*, H. JUDICIARY STANDING COMM. AUDIO TAPES, 31st Leg. (Mar. 18, 2019) (public testimony at 1:56:30 PM) (testimony reiterating the multitude of problems created by the *Whalen* decision).

doubling of the order's fairly invasive restraints, and unlike in 2019, the deliberations were not prompted by any event in particular, especially not an event like the *Whalen* decision.

Yet, the respondent's rights were nonetheless still present during these hearings. During public testimony, two members of the public did bemoan the burdens faced by respondents;¹²⁴ however, it does not appear that legislators grappled vocally with these brief comments, at least not during the hearing, and especially not to the degree that they had discussed Dierenger's 2004 testimony.¹²⁵

At two other moments during hearings, legislators did discuss the interests of the respondent. The first instance occurred during the March 7 hearing, when Representative Sarah Vance wondered what protections were in place for those who felt they were wrongly accused of domestic violence.¹²⁶ Maggie Humm of the Alaska Legal Services Corporation replied that respondents should receive notice of the proceedings, have a right to be heard during the proceedings, and be able to appeal the issuance of a protective order.¹²⁷

Later, in a March 18 Judiciary Committee hearing, the discussion shifted to the duration of sexual assault and stalking protective orders.¹²⁸ After Representative Gabrielle LeDoux queried whether Representative Kopp believed it was wise to increase sexual assault and stalking protective orders from six months to one year, Representative Kopp replied that he was conflicted because he wanted to balance "protect[ing] people as long as possible" with avoiding violations of individuals' liberty.¹²⁹ Representative Kopp's comments echoed the sentiment that persisted throughout the 2004 amendment process, though that sentiment hardly affected these deliberations. Unlike in 2004, the drafters of this amendment set out to solve a specific problem, a problem that was deemed anathema to the statute's core purpose, and perhaps a broader discussion of the respondent's liberty would have been inappropriate given these circumstances. Ultimately, HB 12 was enacted in June 2019.¹³⁰

124. See *id.* (testimony of Robin Mitchell and Adam Fletcher at 2:06:10 PM) (describing struggles faced by respondents of domestic violence protective orders).

125. See *id.*; *supra* Part V.

126. *Hearing on H.B. 12*, H. STATE AFFAIRS STANDING COMM. AUDIO TAPES, 31st Leg. (Mar. 7, 2019) (comments of Representative Sarah Vance at 4:20:05 PM).

127. *Id.* (comments of Maggie Humm at 4:22:05 PM).

128. *Hearing on H.B. 12*, H. JUDICIARY STANDING COMM. AUDIO TAPES, 31st Leg. (Mar. 18, 2019) (introduced by Rep. Chuck Kopp at 1:33:16 PM).

129. *Id.* at 2:21:33 PM.

130. An Act Relating to Protective Orders, 2019 Alaska Sess. Laws ch. 7.

VI. CURRENT STATUTE AND JUDICIAL TREATMENT

The following reflect the changes to section 18.66.100(e) of the Alaska Statutes:

(e) A court may not deny a petition for a protective order under this section solely because

(1) ~~there is~~ a lapse of time between an act of domestic violence and the filing of the petition;

(2) *the act of domestic violence was the basis for a previous protective order; or*

(3) *a court previously found that the incident was a crime of domestic violence committed against the petitioner but declined to order relief under this section, if the petition alleges a change in circumstances since the court's previous finding.*¹³¹

Furthermore, the legislature added a new subsection to provide for a renewal mechanism:

(f) Within 30 days before, or within 60 days after, the expiration of a protective order issued or extended under (b)(2) of this section, a petitioner may petition the court for an extension of the protective order. The court shall schedule a hearing and provide at least 10 days' notice to the respondent of the hearing and of the respondent's right to appear and be heard, either in person or through an attorney. If the court finds that an extension of the provisions of the order is necessary to protect the petitioner from domestic violence, regardless of whether the respondent appears at the hearing, the court may extend the provisions of the order. An extension granted under this subsection is effective for one year unless earlier dissolved by court order. If the court grants an extension before the protective order expires, the extension takes effect on the day the protective order would have expired.¹³²

The legislature solved the *Whalen* issue using a two-pronged approach. First, the legislature, in subsection (e)(3), explicitly rejected the notion that a new order could not be granted even if it was based on the same act of domestic violence—in other words, the exact issue posed in

131. ALASKA STAT. § 18.66.100(e) (2018); An Act Relating to Protective Orders, § 4, 2019 Alaska Sess. Laws ch. 7, 2. Additions are in bold italics, and deletions are indicated with strikethroughs.

132. An Act Relating to Protective Orders, § 5, 2019 Alaska Sess. Laws ch. 7, 2–3.

Whalen.¹³³ Second, the legislature included subsection (f), which provides for an extension mechanism.¹³⁴ While not explicitly at issue in *Whalen*, this extension provision would have resolved Sarah Whalen’s dilemma because such an extension would not require proof of additional acts other than those that served as the basis for the original order.

Shortly after the amendment, the Alaska Supreme Court ruled in *Mitchell v. Mitchell*¹³⁵ that the legislature had adequately solved the issue that the court had highlighted in *Whalen*.¹³⁶ Yet, despite this limited fix, a survey of other states demonstrates that Alaska can nonetheless improve on section 18.66.100, tackling issues well beyond the addition of the renewal mechanism, a mechanism that should have been included in the statute to begin with.

VII. PROTECTIVE ORDER STATUTES IN OTHER STATES

Should the Alaska legislature see fit to further exercise its “prerogative to make any policy changes to the statute,”¹³⁷ protective order statutes in other states offer a roadmap for change. This Section distills the wide variety of statutes into a few categories. It begins by inspecting the discretionary model. Then, the Section moves on to discuss forms of extensions. Then the Section assesses the less common hybrid and permanent approaches. Lastly, this Section culminates with an overview of how firearms are treated in these statutes.

A. Discretionary Model

Some statutes, such as North Dakota’s, give the court the discretion to grant a protective order for however long it deems necessary to protect the petitioner.¹³⁸ North Dakota’s statute does not contain time limitations for its remedial provisions. Instead, the North Dakota Supreme Court has interpreted the statute to give the court full discretion to set the length of the order, even allowing for indefinite orders, so long as the length of the

133. § 18.66.100(e)(3); An Act Relating to Protective Orders, § 4, 2019 Alaska Sess. Laws ch. 7, 2.

134. § 18.66.100(f); An Act Relating to Protective Orders, § 5, 2019 Alaska Sess. Laws ch. 7, 2–3.

135. 445 P.3d 660 (Alaska 2019).

136. *See id.* at 664 (Alaska 2019) (acknowledging that the legislature, by amending the law on protective orders, had clarified the issue addressed in *Whalen* and granted courts the authority to issue additional long term protective orders relying on the same conduct that served as a basis for the original order).

137. *Whalen v. Whalen*, 425 P.3d 150, 156 (Alaska 2018).

138. N.D. CENT. CODE § 14-07.1-02 (2019).

order is “reasonable under the facts of each particular case.”¹³⁹ Additionally, North Dakota’s statute permits the court to grant an order “upon a showing of actual or imminent domestic violence.”¹⁴⁰ This standard enables the court to grant an order based solely on the petitioner’s fear, rather than, as a threshold matter, requiring a past act; however, the court does hold petitioners to an exacting standard, which, in practice, likely requires evidence of past abuse.¹⁴¹

Hawaii’s statute is similar to North Dakota’s, except that, instead of leaving the issue of discretion to the judiciary, the legislature explicitly provided courts with the discretion to grant an order for a “fixed reasonable period as the court deems appropriate.”¹⁴²

Vermont’s statute is perhaps the most interesting of the three discretionary models assessed in this Note.¹⁴³ The injunctive relief available is not limited in the statute, except that the length of the order must “be granted for a fixed period.”¹⁴⁴ However, the court does not have discretion as to whether to grant the order; instead, the legislature mandates that the court grant an order if it “finds that the defendant has abused the plaintiff,” and if “there is a danger of further abuse.”¹⁴⁵ In fact, the Vermont Supreme Court has taken this mandate to nullify any res judicata arguments.¹⁴⁶

These discretionary models do have drawbacks, largely in that they offer unpredictable protection. Giving the court broad discretion to set the length of the protective order could lead to unfairly detrimental outcomes for both the petitioner and the respondent. For the abused, a lack of uniformity could mean a lack of protection. As an empirical matter, academics have found that courts “trivialize[] domestic violence cases,”¹⁴⁷ and that the “history of domestic violence is not properly considered in cases of child custody, child support, and visitation.”¹⁴⁸ In the child

139. *Rinas v. Engelhardt*, 818 N.W.2d 767, 771 (N.D. 2012).

140. N.D. CENT. CODE § 14-07.1-02(4) (2019).

141. See *Niska v. Falconer*, 824 N.W.2d 778, 782 (N.D. 2012) (“[P]ast abusive behavior and the context and history of the parties’ relationship are relevant factors in determining whether domestic violence is actual or imminent.”).

142. HAW. REV. STAT. § 586-5.5(a) (2019).

143. VT. STAT. ANN. tit. 15, § 1103 (2019).

144. *Id.* § 1103(d).

145. *Id.* § 1103(c)(1)–(c)(1)(A).

146. See *Woodward v. Woodward*, No. 12-113, 2012 Vt. Unpub. LEXIS 125, at *6 (Vt. Sept. 26, 2012) (“[W]e reject defendant’s suggestion that mother was precluded from raising instances of abuse cited in the earlier RFA proceeding and could not obtain a new RFA order unless she proved new abuse by defendant since the initial order issued.”).

147. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN’S STUD. 1, 56 (1996).

148. *Id.* at 57 tbl.1 (describing the results presented in a table that nine of the fourteen states studied found domestic violence did not play a major role when

support context, complete discretion tends to lead to inconsistent outcomes and lower support awards.¹⁴⁹ Victims of domestic violence suffer from bias inside and outside the courtroom,¹⁵⁰ so providing guidelines to judges as they determine the length of orders could ensure added protection.

Respondents to protective orders face significant bias as well. Unfortunately, there exist few studies that shed any light on how the respondents face bias; however, case-by-case, qualitative examples demonstrate the phenomenon. In North Dakota, the supreme court had to modify a protective order down from twenty years to five years.¹⁵¹ Some argue that Hawaii and Vermont, due to the considerable deference given to the trial judges, suffer from a lack of clarity when it comes to formulating the length of protective orders.¹⁵² Undoubtedly, the wide discretion afforded to these judges, coupled with bias, could lead to wildly unpredictable results.¹⁵³

B. Fixed-Limit Extension Model

Some states fix the duration of orders but provide for an extension mechanism. Alaska's current statute is categorized as a fixed-limit extension model.¹⁵⁴ These mechanisms come in a variety of forms. Some states apply an objective reasonableness standard to determine whether

considering child custody, child support, and visitation).

149. Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1083–84 (2014).

150. See generally Wendy L. Patrick, Ph.D., *How Social Stigma Silences Domestic Violence Victims*, PSYCHOL. TODAY (Apr 9, 2018), <https://www.psychologytoday.com/us/blog/why-bad-looks-good/201804/how-social-stigma-silences-domestic-violence-victims> (explaining why victims of domestic violence often remain silent); ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (2015), <https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing> (summarizing recommendations and stories by practitioners who work with survivors of domestic violence); Kristine Phillips, 'Intolerable': Judge Reprimanded After She 'Berated and Belittled' Domestic-Violence Victim, WASH. POST, (Sept. 1, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/01/intolerable-judge-reprimanded-after-she-berated-and-belittled-domestic-violence-victim/?noredirect=on&utm_term=.6bcc8286ef4b (reprimanding a judge under the state's code of judicial conduct after she "berated" and "belittled" a woman, using "sarcastic" language throughout the hearing).

151. *Rinas v. Engelhardt*, 818 N.W.2d 767, 771–72 (N.D. 2012).

152. Dana Harrington Conner, *Civil Protection Order Duration: Proof Procedural Issues, and Policy Considerations*, 24 TEMP. POL. & CIV. RTS. L. REV. 343, 351–52 (2015).

153. See *id.* at 349–52 (discussing how the lack of guidance and considerable discretion enjoyed by judges in states that have adopted a discretionary model can lead to unpredictable outcomes).

154. ALASKA STAT. § 18.66.100(f) (2019).

an order should be extended. California, for instance, limits initial orders to a maximum of five years, but the statute allows the orders to be renewed based on such a standard.¹⁵⁵ The renewals can last an additional five years, or they can be made permanent.¹⁵⁶ The standard for renewals, set forth in *Ritchie v. Konrad*,¹⁵⁷ is quite lenient: the trial court “should grant a requested extension unless the request is contested and the judge determines the protected party does not entertain a ‘reasonable apprehension’ of future abusive conduct.”¹⁵⁸ The court in *Ritchie* emphasized that “it is unnecessary, however, to find [whether] any abuse has occurred since issuance of the initial protective order.”¹⁵⁹ Ohio adopted a similar standard, requiring a trial court to find “that petitioner has shown by a preponderance of the evidence that petitioner or petitioner’s family or household members are in danger of domestic violence.”¹⁶⁰ Utah has adopted a similar approach.¹⁶¹ The statute mandates that a judge must find a “substantial likelihood of abuse or domestic violence.”¹⁶² In *Bailey v. Bayles*,¹⁶³ the Utah Court of Appeals established that, in petitions for permanent protective orders, the substantial likelihood test equated to whether there was “a present fear of future abuse,” emphasizing that the “present fear” must be “reasonable.”¹⁶⁴ Minnesota codified a reasonableness standard in its test for prohibiting the respondent from possessing firearms.¹⁶⁵

Some states require evidence that the order was violated in order to extend it. Delaware requires that the order can only be extended when the court finds, by a preponderance standard, that “domestic violence has occurred since the entry of the order,” or “a violation of the order has occurred.”¹⁶⁶ Texas once required a violation of the initial order for a new order to be granted;¹⁶⁷ however, the legislature instituted a new standard, allowing a petitioner to file with just a description of “the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.”¹⁶⁸

155. CAL. FAM. CODE § 6345 (Deering 2020).

156. *Id.*

157. *Ritchie v. Konrad*, 10 Cal. Rptr. 3d 387 (Cal. Ct. App. 2004).

158. *Id.* at 388.

159. *Id.*

160. *Felton v. Felton*, 679 N.E.2d 672, 678 (Ohio 1997).

161. UTAH CODE ANN. § 78B-7-103 (LexisNexis 2020).

162. *Id.*

163. 18 P.3d 1129 (Utah App. 2001).

164. *Id.* at 1131–33.

165. MINN. STAT. ANN. § 518B.01(6a) (2018).

166. DEL. CODE ANN. tit. 10, § 1045 (West 2018).

167. Bree Buchanan & Cindy Dyer, *76th Legislative Session Domestic Violence Law Update*, 62 TEX. B.J. 922, 923 (1999).

168. TEX. FAM. CODE ANN. § 82.008 (West 2018).

While most petitioners bear the burden of proof in order to extend or renew a protective order,¹⁶⁹ in Washington, the burden is on the respondent.¹⁷⁰ Washington mandates the court to grant a renewal “unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner’s children or family or household members when the order expires.”¹⁷¹

Generally, most states that mandate a one-year initial order also permit year-long extensions.¹⁷² With that said, some states take a different approach to the length of the extension, basing the length of an extension on whether the initial order is violated. In Tennessee, the initial order is limited to one year.¹⁷³ The respondent’s first violation may be accompanied by an extension of up to five years, and upon a second violation, the court may extend the order by up to ten years.¹⁷⁴ Similarly, initial protective orders in Maryland are capped at one year, but violating the order allows the court to grant a final protective order of two years.¹⁷⁵ West Virginia’s initial order is limited to only ninety days, but if it is violated, the judge can extend the order indefinitely “for whatever period the court considers necessary to protect the physical safety of the petitioner.”¹⁷⁶ On the extreme side, in Minnesota, when the respondent has violated an order more than twice, or if the petitioner has had more than two protective orders issued against the respondent, the statute allows a fifty-year order prohibiting contact and domestic violence.¹⁷⁷ Some states permit a permanent extension beyond the initial order. California allows for orders to be renewed permanently.¹⁷⁸ Georgia also provides for a permanent extension.¹⁷⁹

C. Hybrid Approach

Another model is the hybrid approach. Alaska additionally utilizes this approach—most provisions last one year, but subsection (c)(1), prohibiting acts or threats of domestic violence, can persist indefinitely.¹⁸⁰

169. Stoeve, *supra* note 149, at 1050.

170. See WASH. REV. CODE ANN. § 26.50.060(3) (West 2018).

171. *Id.*

172. Stoeve, *supra* note 149, at 1051.

173. TENN. CODE ANN. § 36-3-605(b) (West 2018).

174. *Id.*

175. MD. CODE ANN., FAM. LAW § 4-506(j) (West 2018).

176. W. VA. CODE ANN. § 48-27-505(c) (West 2018).

177. MINN. STAT. ANN. § 518B.01(6a)(c) (West 2018).

178. CAL. FAM. CODE § 6345(a) (West 2018).

179. GA. CODE ANN. § 19-13-4(c) (West 2018).

180. ALASKA STAT. § 18.66.100(b) (2020).

Under this model, some provisions last longer than others. In Delaware, for instance, most provisions last one year, but subsection (a)(1) and (a)(2), which prohibit the respondent from committing future acts of domestic violence and from contacting the petitioner, can last up to two years.¹⁸¹ Louisiana limits most provisions to eighteen months; however, the court can indefinitely prohibit the respondent from “abusing, harassing, or interfering with the person or employment or going near the residence or place of employment of the petitioner.”¹⁸²

D. Permanent Orders

Some states allow for permanent orders. In Alabama, final protection orders are “of permanent duration unless otherwise specified or modified by a subsequent order.”¹⁸³ In Montana, based on the “respondent’s history of violence, the severity of the offense at issue, and the evidence presented at the hearing,” the court can grant a permanent order, which may contain any of the provisions allowed in a temporary order.¹⁸⁴ New Jersey allows for permanent orders, termed “final restraining orders.”¹⁸⁵ Under the New Jersey law, the court must find, by a preponderance of the evidence, that the respondent committed one of the predicate acts required by the statute.¹⁸⁶ Second, the court exercises its discretion as to whether a final restraining order should be granted.¹⁸⁷ This decision is guided by a series of factors codified in the restraining order statute.¹⁸⁸ These factors are not comprehensive, but they offer New Jersey courts with a road map for instituting orders that have severe consequences. The factors are:

- (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
- (2) The existence of immediate danger to person or property;
- (3) The financial circumstances of the plaintiff and defendant;
- (4) The best interests of the victim and any child;
- (5) In determining custody and parenting time the protection of

181. DEL. CODE ANN. tit. 10, § 1045(a)–(b) (West 2018).

182. LA. STAT. ANN. § 46:2135(A)(1) (2020) ((referencing the full description of prohibited behavior from § 46:2135(A)(1)).

183. ALA. CODE § 30-5-7(d)(2) (2018).

184. MONT. CODE ANN. § 40-15-204 (West 2018).

185. N.J. STAT. ANN. § 2C:25-29 (West 2018); *A.M.C. v. P.B.*, 447 N.J. Super. 402, 414 (Super. Ct. App. Div. 2016).

186. *Silver v. Silver*, 387 N.J. Super. 112, 125 (Super. Ct. App. Div. 2006); N.J. STAT. ANN. § 2C:25-19a (West 2018).

187. *Silver*, 387 N.J. Super. at 126–27.

188. *Id.* at 456.

the victim's safety; and

(6) The existence of a verifiable order of protection from another jurisdiction.¹⁸⁹

New Jersey's guided approach is an interesting solution to a process that can be susceptible to bias, but some commentators have highlighted serious flaws in the law, including an unnecessarily restrictive definition of abuse,¹⁹⁰ as well as a failure to address incidents of non-intimate partner violence.¹⁹¹

F. Firearms

Limitations on the respondent's ability to purchase and possess firearms are among the most effective provisions, but they are also perhaps the most contentious due to their tendency to limit the exercise of the Second Amendment. Crimes of domestic violence represent unique challenges when it comes to prevention. The abuse often gets worse with time,¹⁹² and similarly, the likelihood that the abuser uses a weapon increases with time.¹⁹³ Additionally, according to the Giffords Law Center, women are five times more likely to be killed when the abuser owns a firearm, and acts of domestic violence are twelve times more likely to end in death when they involve a firearm.¹⁹⁴

Furthermore, policy choices regarding gun regulations may impact intimate partner homicide. One recent study of all states showed that those with the highest firearm ownership experienced a 64.6% higher domestic homicide rate compared to states with lower firearm ownership rates.¹⁹⁵

With that said, it is not entirely clear if protective orders aid in

189. N.J. STAT. ANN. § 2C:25-29(a) (West 2018).

190. Conner, *supra* note 152, at 355.

191. Nick Tamburri, Note, *A Lack of Civility: How New Jersey Fails to Protect Women*, 43 SETON HALL L. REV. 1041, 1074 (2013).

192. Stoever, *supra* note 149, at 1023 (citing Jessica R. Goodkind et al., *A Contextual Analysis of Battered Women's Safety Planning*, 10 VIOLENCE AGAINST WOMEN 514, 515 (2004) ("Once battering begins, it often escalates in frequency and severity over time.")).

193. Stoever, *supra* note 149, at 1024 (citing Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 1155 (1993)) ("[I]t is well documented that as domestic violence escalates, batterers often begin using weapons against their victims.").

194. *Domestic Violence & Firearms*, GIFFORDS L. CTR. (last visited Dec. 20, 2018), <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/#state>.

195. Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. OF PREVENTATIVE MED. 311, 319 (2019).

prevention, though studies certainly indicate that they do make a positive difference. A 2009 Department of Justice report stated that “[t]he research has not been able to answer this question definitively, mainly because it is not ethically permissible to randomly grant or deny protective orders to compare results.”¹⁹⁶ However, a more recent study from Michigan State University found that states with domestic violence protective order statutes that included firearm restrictions experienced a ten percent reduction in domestic-violence-related homicides,¹⁹⁷ which confirmed similar results in prior studies.¹⁹⁸

Currently, Alaska’s statute permits firearm restrictions only “if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence.”¹⁹⁹ In addition to Alaska, forty-two other states prohibit, in some form, the purchase or ownership of weapons while an order is in effect.²⁰⁰ The most progressive laws require police officers to confiscate firearms from the respondent once a domestic violence restraining order is granted.²⁰¹ Less effective statutes require the respondent to surrender firearms when subject to a protective order,²⁰² and other states only require respondents to do so

196. U.S. DEP’T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 58 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

197. April Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations With Intimate Partner Homicide*, 187 AM. J. EPIDEMIOLOGY 2365, 2366 (2018), <https://academic.oup.com/aje/article-abstract/187/11/2365/5154833?redirectedFrom=fulltext>.

198. See Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 332 (2006), <https://journals.sagepub.com/doi/10.1177/0193841X06287307> (finding an eight percent reduction in the domestic violence rate and a nine percent reduction in the rate of domestic violence crimes committed with a firearm); April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 INJ. PREVENTION 90, 92 (2010), <https://injuryprevention.bmj.com/content/injuryprev/16/2/90.full.pdf> (“[S]tate laws restricting access to firearms for those under [protective orders], laws allowing the police to arrest [protective order] violators, and higher police staffing levels reduce the risk of intimate-partner homicides.”).

199. ALASKA STAT. § 18.66.100(c)(6)–(7) (2019).

200. GIFFORDS L. CTR., *supra* note 194.

201. See, e.g., N.J. STAT. ANN. § 2C:25-29(b) (“A law enforcement officer shall accompany the defendant, or may proceed without the defendant if necessary, to any place where any firearm or other weapon belonging to the defendant is located to ensure that the defendant does not gain access to any firearm or other weapon, and a law enforcement officer shall take custody of any firearm or other weapon belonging to the defendant.”); GIFFORDS L. CTR., *supra* note 194.

202. See, e.g., N.H. REV. STAT. ANN. § 173-B:5(I) (stating that, upon finding that domestic violence occurred, the court “shall direct the defendant to relinquish to the peace officer any and all firearms and ammunition in the control, ownership,

when certain conditions are met.²⁰³ Lastly, the weakest form of the statute permits (rather than requires) courts to direct respondents to surrender firearms.²⁰⁴ Alaska falls into this final category.²⁰⁵

The strength of the statute is important because many respondents never relinquish their firearms, even when ordered by the court.²⁰⁶ Indeed, the process by which firearms are removed can play an important role in the strength of the statute. Some statutes, like Alaska's, fail to provide any instructions as to how firearms should be removed,²⁰⁷ whereas others, like Pennsylvania, detail the process meticulously.²⁰⁸

VIII. CONCLUSION

The path forward for Alaska's domestic violence protective order statute has been paved by the trial and error of its fellow forty-nine states. Additionally, the legislative history of section 18.66.100 should provide some guidance as to a proper approach. The Alaska legislature has taken the much-needed step forward to fix the *Whalen* outcome, but arguably this fix should have been included in the original bill. And compared to other states, the Alaska protective order statutory scheme lags behind.

The legislature must embrace its power to proactively tackle domestic violence and intimate partner homicide. This seems straightforward, but reviewing the deliberations demonstrates that, often, legislators are willing to nudge the statute forward only when it seems that Alaska is out of lockstep with the perceived standard set by other states. This is problematic for three reasons. First, as shown in the preceding Sections, finding a true standard is an impossible task, as these statutes are quite varied. Second, domestic violence is an inherently

or possession of the defendant"); GIFFORDS L. CTR., *supra* note 194.

203. See, e.g., N.Y. FAM. CT. ACT § 842-a(2)(a) ("[The court shall] order the immediate surrender [of firearms] where the court finds that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of physical injury . . . , (ii) the use or threatened use of a deadly weapon or dangerous instrument . . . , or (iii) behavior constituting any violent felony offense."); GIFFORDS L. CTR., *supra* note 194.

204. See, e.g., IND. CODE ANN. § 34-26-5-9(c)(4); ALASKA STAT. §18.66.100(c)(7) (2020); GIFFORDS L. CTR., *supra* note 194.

205. § 18.66.100(c)(7) (2020).

206. See Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from Their Abusive Partners: Results from an Exploratory Study*, 19 J. OF WOMEN'S HEALTH 93, 96 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3120094/pdf/jwh.2007.0530.pdf> (in a study of female victims of domestic violence in New York and Los Angeles, only twelve percent reported that their abuser had surrendered his firearms or had them seized).

207. GIFFORDS L. CTR., *supra* note 194.

208. See 23 PA. CONS. STAT. AND CONS. STAT. ANN. § 6108(7) (West 2018) (detailing meticulous process for firearm removal).

complex issue, which requires a proactive approach; the legislature cannot continue to wait until Alaska seems behind the pace of an already unclear standard. Lastly, the issue of domestic violence is potentially worse in Alaska than in any other state. One Anchorage-based activist described the problem through this lens: “If Alaska was a Third World country, with the rates of domestic violence and sexual assault that we have, they’d declare a humanitarian crisis and the United Nations would move in.”²⁰⁹ To truly make a dent in this issue, the legislature should adopt a leadership – not lockstep – mentality. This is where the menu of options available, based on other states’ approaches, should prove useful.

A. Length

A number of states empower judges with the discretion to tailor the length of orders,²¹⁰ whereas section 18.66.100 mandates a year-long order (aside from the indefinite length applicable in subsection (c)(1)).²¹¹ The discretion to issue a longer order could be useful for the worst cases; petitioners would not be forced to confront their abusers in court, relive the abuse, and repeatedly make their case year after year. And longer orders would ensure a longer period of protection as well. Instead of burdening a petitioner with the task of renewing the protective provisions, the provisions would persist for a timeframe more consistent with the potential harm.

Relatedly, the legislature could codify the possibility of a permanent order.²¹² Some cases of domestic violence are so heinous and persistent that a permanent order could be a proportionate solution, but without that possibility, such cases are treated as any other. States offering the option of a permanent order typically include a series of factors upon which the court can base its decision,²¹³ likely due to the severe consequences of such orders. If it should choose to include an option for a permanent order, the Alaska legislature should follow suit and identify factors to help guide courts.

209. Lindsay Schnell, *A Deadly place: Alaska is the Most Dangerous State for Women, Now They’re Fighting Back*, USA TODAY (June 25, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/06/25/deadly-place-metoo-hits-alaska-women-demand-tougher-laws/1503365001/>.

210. See *supra* Section VII.A.

211. ALASKA STAT. § 18.66.100(b)(2) (2019).

212. See *supra* Section VII.D.

213. See *supra* Section VII.D.

B. Extension Mechanism

The legislative response to *Whalen* was subsection (f), which requires the petitioner to convince the court that “an extension of the provisions of the order is necessary to protect the petitioner from domestic violence.”²¹⁴ While an adequate response to *Whalen*, the extension can be improved to address more than just that defect.

First, Alaska could place the burden of persuasion on the respondent, as seen in Washington.²¹⁵ There, the *respondent* must prove “by a preponderance of the evidence that the respondent will not resume acts of domestic violence.”²¹⁶ Legally, such a burden ensures that the respondent must undertake the legwork of collecting the evidence necessary to prove why the respondent is no longer a threat. The work of dispelling the presumption that the respondent is prone to future violence should legally fall upon the respondent’s shoulders, not just because it forces the respondent to take accountability for past acts and future behavior, but most importantly because such evidence is likely in the respondent’s possession and control, not the petitioner’s.

For fairness purposes, the perpetrator of domestic violence should at least demonstrate why consequences, triggered *by the respondent*, need not continue to restrain the respondent; victims should not be compelled to satisfy a burden of proof to ensure their own protection. Lastly, the petitioner’s requirement of showing the necessity of an extension is a high bar to meet, especially when the respondent has not in fact demonstrated further harmful behavior. There is little reason to avoid requiring the respondent, who instigated the necessity of the original order, to at least meet a similar burden.

Second, Alaska could tie mandatory extensions to the violation of a protective order, similar to Tennessee.²¹⁷ Not only would this promote efficiency, but it could serve a preventative function. The knowledge that a violation would lead to more severe consequences—a graduated extension length corresponding to the number of violations—might dissuade bad actors.

C. Firearms

The treatment of firearms in section 18.66.100 is the most pressing aspect of future amendments. Considering the evidence tying gun

214. § 18.66.100(f).

215. WASH. REV. CODE ANN. § 26.50.060(3) (West 2018).

216. *Id.*

217. TENN. CODE ANN. § 36-3-605(b) (West 2018); *see also supra* Section VII.B.

ownership to intimate partner homicide,²¹⁸ common sense dictates that those who are subject to domestic violence restraining orders should also be subject to stricter firearm restrictions. Alaska authorizes courts to direct respondents to surrender their firearms, and courts are granted that authority only when the court finds that the respondent was in actual possession of or used a firearm while committing the domestic violence.²¹⁹ This provision is problematic for three reasons.

First, courts are not required to direct respondents to surrender their firearms, they are merely authorized to do so. The connection between domestic violence, access to firearms, and intimate partner homicide is too overwhelming to merely authorize a court to direct the relinquishment of firearms.

Second, permitting the court to order the respondent's relinquishment only when certain conditions are met is an unnecessary constraint. The issue is that domestic violence, however it may arise, can lead to intimate partner homicide; thus, it is too constrictive at best, and arbitrary at worst, to order firearm relinquishment only when the violence is perpetrated with a firearm or when a firearm is actually possessed.

Third, merely ordering the relinquishment of firearms is not effective.²²⁰ The legislature should turn to Pennsylvania for a guide on detailing the process by which firearms should be revoked, a process which, ideally, should be carried out by law enforcement.²²¹

While the legislature should be commended for its swift action following *Whalen*, the 2019 amendment should open the door to further action rather than a regression to complacency. The aforementioned recommendations may instruct the legislature should it choose to amend the law. The scourge of domestic violence is perhaps worse in Alaska than in any other state, and it is time for the legislature to lead on the issue. This Note outlines how the statutory scheme has developed to its current condition, and it details a number of improvements that the legislature can adopt. However, this Note covers only some of the legislative tools available, and ideally the legislature can more comprehensively address domestic violence than it has in the past. The time is ripe for action, and with effective lawmaking, lives can be saved.

218. *Supra* Section VII.D.

219. § 18.66.100(c)(7).

220. Webster et al., *supra* note 206.

221. See 23 PA. STAT. AND CONS. STAT. ANN. § 6108(7) (West 2018) (detailing a meticulous process for firearm removal).